Supreme Court, U.S.
FILED
DEC 14 2000
CLERK

(2)

No. 00-785

In The

Supreme Court of the United States

STAN HABR,

Petitioner,

vs.

WORLD SAVINGS AND LOAN ASSOCIATION,
a federally chartered savings and loan association,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeal Of The State Of California First Appellate District, Division Two

RESPONDENT'S BRIEF IN OPPOSITION

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REASONS FOR DENYING THE WRIT

The sole substantive question presented by the Petition filed by Stan Habr ("Habr") is whether due process should be accorded in connection with an arbitration proceeding conducted under state law pursuant to a contract which was executed by Habr and World Savings and Loan Association ("World") which provided for binding arbitration of disputes which arose thereunder. The alleged violations of due process claimed by Habr in the Petition were not raised and/or addressed in the appeal taken by Habr from the arbitration award to the Court of Appeal of the State of California. Therefore, they cannot be considered by this Court.

Further, the Petition should be denied because, as was noted by the California Court of Appeal in its opinion attached as Exhibit A to the Appendix to the Petition, there is no evidence in the record to support much of the procedural history of this case set forth in the Petition about which Habr now complains.

Finally, the Petition should be denied because although Habr complains that the arbitration panel awarded World attorneys' fees, Habr himself sought an award of attorneys' fees in the complaint which he filed against World in the Superior Court of California for the County of Sacramento. Thus, Habr is judicially estopped from contending that World should not have obtained an award of attorneys' fees in connection with the arbitration.

STATEMENT OF THE CASE

The statement of the case set forth in the Petition presents a less than accurate history of Habr's litigation with World. The following additional points need to be recognized by this Court in connection with its consideration of the Petition and World's opposition thereto.

First, the "state ordered private arbitration" about which Habr complains actually arose as a result of Habr's execution of a Real Estate Purchase Contract in favor of World in connection with Habr's purchase of a 130 unit apartment complex located in Sacramento, California. *See* Opinion of the California Court of Appeal attached as Exhibit A to the Appendix to the Petition ("Ct. App. Op."), pp. 1-2. Thus, the Petition's constant reference to "state mandated private arbitrations" is in error, in that the arbitration which is the subject of the Petition was held pursuant to a contract which Habr voluntarily executed with World and in which he agreed to voluntarily arbitrate all disputes arising therefrom.

Second, the various alleged violations of the due process clause of the United States Constitution alleged in the Petition were *not* raised by Habr in opposition to World's Petition filed in the Superior Court for the County of Alameda to confirm the arbitration award rendered against Habr and were not raised to the California Court of Appeal in connection with his appeal of the Superior Court's order confirming the arbitration award. *See* Ct. App. Op., pp. 10-30; and World's Appendix 17-37.

Finally, Habr's Petition neglects to mention that the complaint which he originally filed in the Superior Court

of California for the County of Sacramento that ultimately gave rise to the arbitration award which is the subject of Habr's Petition sought an award of attorneys' fees and costs against World. World's Appendix 51-53.

I.

THE ALLEGED DUE PROCESS VIOLATIONS RAISED BY HABR IN THE PETITION WERE NOT PRESENTED TO THE CALIFORNIA COURT OF APPEAL AND THUS CANNOT BE REVIEWED BY THIS COURT

It is well settled law that this Court will normally not consider a petitioner's federal claims unless those claims were either addressed by or properly presented to the state court whose decision is the subject of the Petition. In *Adams v. Robertson*, 520 U.S. 83, 86-87 (1997), this Court stated as follows with respect to this issue:

> With "very rare exceptions," (citation omitted) we have adhered to the rule in reviewing state court judgments under 28 U.S.C. § 1257 that we will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review. (Citations omitted). As petitioners concede here, the Alabama Supreme Court did not expressly address the question on which we granted certiorari. (Citation omitted).
>
> Nor have petitioners met their burden of showing that the issue is properly presented to that court. When the highest state court is silent on a federal question before us, we assume that the

> issue was not properly presented, (citation omitted) and the aggrieved party bears the burden of defeating this assumption . . . by demonstrating that the state court had "a fair opportunity to address the federal question that is sought to be presented here," (Citation omitted).

Similarly, in *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537, 549-50 (1987), this Court stated as follows with respect to this issue:

> Finally, appellants contend that the Unruh Act is unconstitutionally vague and overbroad. We conclude that these contentions were not properly presented to the state courts. It is well settled that this Court will not review a final judgment of a state court unless "the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system." (Citation omitted).

A review of the opinion of the California Court of Appeal attached as Appendix A to Habr's Petition, as well as the brief filed by Habr with the California Court of Appeal which is attached as Appendix A hereto, reveals that the alleged violations of the due process clause of the United States Constitution which serve as the basis of the Petition were not raised by Habr in the California Court of Appeal. In addition, there is no evidence in the Petition that these alleged due process violations were raised in the Petition for Review filed by Habr with the California Supreme Court or to the Superior Court in connection with the actions taken by World to confirm the arbitration award which was rendered against Habr. In light of the foregoing, since these federal

claims were not presented to the state courts below, they should not be considered by this Court at this late date.

II.

HABR IS ESTOPPED FROM DENYING THAT WORLD WAS ENTITLED TO SEEK AN AWARD OF ATTORNEYS' FEES SINCE HABR HIMSELF SOUGHT SUCH AN AWARD IN THE SUPERIOR COURT ACTION WHICH WAS FILED AGAINST WORLD

The Petition also makes much of the fact that World was awarded attorneys' fees by the arbitration panel in excess of $320,000 even though they "had not been pleaded by World." Habr neglects to point out to this Court that the very complaint filed by Habr against World in the Superior Court of California for the County of Sacramento which ultimately lead to an arbitration award being rendered against Habr sought an award of attorneys' fees and costs against World. World's Appendix 51-53.

Under California law, a party who prays for a contractual award of attorneys' fees in his complaint is judicially estopped from subsequently arguing that the contract which gives rise to an award of attorneys' fees should be interpreted not to award attorneys' fees. *International Billing Services, Inc. v. Emigh*, 2000 WL 1721694, pages 7-10, No. C028706 (California Court of Appeal, 3rd Appellate District, Decided November 17, 2000). Since Habr requested an award of attorneys' fees against World in the complaint which he filed which ultimately led up to an arbitration award being rendered against him, Habr should not now be heard to complain that the arbitration

panel awarded World attorneys' fees when World was successful in defeating Habr's claim. In addition, it is worth noting that Habr did not raise as an issue on appeal the claim that the arbitration panel improperly awarded World attorneys' fees because they had not been pleaded by World. World's Appendix 17-37.

III.

THERE IS NO EVIDENCE IN THE RECORD TO ENABLE THIS COURT TO DECIDE HABR'S CLAIMS THAT HE WAS MATERIALLY PREJUDICED BY HIS ALLEGED INABILITY TO HAVE ADEQUATE DISCOVERY

The opinion of the California Court of Appeal affirming the arbitration award noted in several places that there was no evidence in the record to support Habr's claims of his having been prejudiced by decisions made by the American Arbitration Association ("AAA") with respect to discovery issues, but rather only the argument of counsel. Ct. App. Op. pp. 17-18. This Court should defer to the state court's findings of fact with respect to the alleged constitutional violations which Habr contends occurred, since the factual scenario in question involved a civil proceeding where Habr contractually agreed to engage in binding arbitration. *See Container Corp. of America v. Franchise Tax Board*, 463 U.S. 159, 175-76 (1983). In view of the foregoing, since Habr failed to present *evidence* on this issue to the California Court of Appeal, there is certainly no such evidence which could be presented to this Court of the alleged due process violations which occurred by virtue of Habr's alleged inability to obtain discovery prior to the arbitration hearing.

CONCLUSION

For the foregoing reasons, World respectfully requests that this Honorable Court deny the Petition.

Respectfully submitted,

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App. 1

CIVIL NO.
A084868

In the Court of Appeal

OF THE

State of California

FIRST APPELLATE DISTRICT
DIVISION TWO

STAN HABR
Plaintiff and Appellant,

VS.

WORLD SAVINGS AND LOAN ASSOCIATION,
Defendant and Respondent.

On Appeal from a Judgment of the Superior Court of the State of California for the County of Alameda
(Case No. 750274-7)
The Honorable Henry E. Needham, Jr., Judge

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I.

INTRODUCTION

This appeal arises out of the repeated mishandling of plaintiff and appellant Stan M. Habr's ("Habr") action for intentional fraud in connection with the sale of real property. The trial court erroneously referred Mr. Habr's fraud claim to arbitration at the behest of defendant and respondent World Savings and Loan Association ("World"). The resulting arbitration was plagued by procedural unfairness, prejudicial misconduct by World and the arbitrators' complete disregard for the limits of their authority. Unfortunately, the trial court validated the arbitrators' award, committing reversible error.

II.

ISSUES PRESENTED

A. Did the trial court err by originally referring plaintiff and appellant Habr's intentional misrepresentation claim to binding arbitration, where no agreement to arbitrate that claim existed?

B. Did the trial court err by confirming an arbitration award in favor of respondent World, where World failed to produce key documents during discovery until *after* plaintiff and appellant Habr had taken the depositions of World's witnesses, and where the arbitration panel refused to order World to bear the expense of additional depositions regarding those documents?

C. Did the trial court err by confirming an arbitration award in favor of respondent World, where the arbitration panel refused to allow plaintiff

and appellant to depose a key witness or to cross-examine another regarding central documentary evidence in the case?

D. Did the trial court err by confirming an arbitration award of $320,000 in attorneys' fees and costs in favor of respondent World, where World did not properly request such an award?

E. Did the trial court err by confirming an arbitration award of $320,000 in attorneys' fees and costs in favor of respondent World, where such an award is in direct violation of a federal injunction and the Bankruptcy Court's order confirming plaintiff/appellant's plan of reorganization?

III.

STATEMENT OF FACTS

Plaintiff and appellant Habr takes this appeal from the confirmation of an arbitration award granting approximately $320,000 in attorneys' fees and expenses in favor of respondent World for a four and one-half day arbitration hearing held in March and April of 1997. (Appellant's Appendix ("AA") 0158, 0198.) The arbitration itself arose from World's sale of a 130-unit apartment complex known as the Cadillac South Apartments in Sacramento, California, to appellant Habr on April 16, 1992. (AA 0095, 0002 at ¶ 5.) In addition to arranging the sale of the property to Mr. Habr, World also lent him $2.685 million to purchase the property. (AA 0095).

After Mr. Habr acquired the apartments, he discovered that World had substantially overstated the income and understated the expenses of the apartment complex.

(AA 0002 at ¶ 6.) World's building manager, Thomas Harris, had provided Mr. Habr with a rent roll which contained fictitious tenants and rents. (AA 0096.) Because the actual income and expenses of the Cadillac South Apartments' resulted in a negative cash flow, it became impossible for Mr. Habr to service the $2.685 million loan from the revenues of the complex. (AA 0002 at ¶ 6.) As a result, Mr. Habr defaulted in late 1992. (*Id.*)

A. The Sacramento Litigation

On January 21, 1993, World filed a judicial foreclosure action in the Superior Court for Sacramento County, California, entitled *World Savings and Loan Association v. Habr*, Case No 531746 (the "Sacramento Litigation"). (AA 0002 at ¶ 6, 0052 at ¶ E.) Mr. Habr cross-complained for breach of contract, nondisclosure of material facts, negligent misrepresentation, restitution, and breach of the covenant of good faith and fair dealing, but did not yet include a claim for intentional misrepresentation of the rents. (AA 0014.)

In July of 1993, World agreed to voluntarily dismiss its complaint for judicial foreclosure, in exchange for Mr. Habr's agreement to arbitrate his cross-complaint in the Sacramento Litigation ("Dismissal Agreement"). (AA 0054-56 at ¶¶ 1-3.)

B. The Alameda Action

When Mr. Habr's counsel sought to expand the claims against World in the arbitration, World refused to allow any new causes of action to be added. Instead,

World threatened to obtain an injunction from the Superior Court should Mr. Habr continue to attempt to include a claim not in the existing cross-complaint of the Sacramento Litigation. (AA 0069.)

Accordingly, new counsel for Mr. Habr prepared and filed the new claims in the Alameda Superior Court (the "Alameda Action"). World then completely reversed its position and demanded that the Alameda Superior Court refer to the new claims back to arbitration. (*See* AA 0109.) When Mr. Habr's new intentional misrepresentation claim survived World's demurrers, the Alameda Superior Court then referred it to arbitration. (*Id.*) Plaintiff Habr amended his arbitration claim to include the new action. (AA 0117 at ¶ 8.)

C. Plaintiff Habr's Bankruptcy

While the litigation was pending, on July 22, 1994, Mr. Habr filed for reorganization under Chapter 11 in Division Five (San Jose) of the Bankruptcy Court for the Northern District of California, *In re Stanley Michael Habr*, Case No. 94-54795-JRG. On January 6, 1997, The Honorable James R. Grube confirmed a plan of reorganization in favor of Mr. Habr (the "Plan"), which specifically provided that the Bankruptcy Court would retain jurisdiction over administrative claims against the bankruptcy estate. (AA 0147 at § 11.1.)

World filed repeated objections to the Plan of Reorganization (which specifically provides for the prosecution of the Alameda Action), but never divulged or filed a claim against the estate for attorneys' fees related to the arbitration. Nothing in the Plan permitted World to

recover attorneys' fees or expenses from Mr. Habr. (AA 0133.) In fact, World did not disclose any intention to assert a claim for attorneys' fees in the bankruptcy proceeding until *after* the arbitration hearing. (AA 0153.)

D. The Arbitration

The arbitration was fraught with substantial procedural irregularities and errors. First, the proceedings were delayed because World failed to produce the loan file relevant to the Cadillac South Apartments – a total of 854 pages directly related to the transaction – until after depositions of the percipient witnesses in the case had been completed. (AA 0293 at ¶ 11, 0353 at ¶ 3.) As a debtor emerging from reorganization, Mr. Habr did not have the financial resources to retake the depositions. The American Arbitration Association panel which was assigned to the matter (the "arbitration panel") refused to order World to bear the cost of re-deposing the witnesses. (AA 0293 ¶ 12, 0353 at ¶ 4.) Thus, Mr. Habr was unable to develop evidentiary leads in the suppressed file through the discovery process.

Second, the arbitration panel increased its initial fee demand almost eight-fold, from $12,000 to $80,000, which it required the parties to deposit in advance of the arbitration. (AA 0130.) This outrageous increase in the fee requirement placed a severe burden on the insolvent Mr. Habr, who could not withdraw from the arbitration.[1]

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[1] Having been compelled to arbitrate the intentional misrepresentation claim against his will, Mr. Habr had no choice but to advance the newly demanded fee deposit, As a Chapter

Third, during the arbitration proceeding, the panel refused to allow cross-examination of World's building manager about the names in a rent roll he had given to Mr. Habr. The panel refused to allow any questions on how the names on the rent roll given to Mr. Habr compared to the names on World's in-house rental roll. This was primary evidence needed to support Mr. Habr's claim of fraud. (AA 0353-54 at ¶ 5.) Without open cross-examination regarding the false entries on the rent roll, Mr. Habr was prevented from showing that Mr. Harris had falsified the list of tenants and related rents. (*Id.*)

On April 7, 1997, the arbitration concluded. Conceding that the rent roll was "subject to interpretation," the panel nonetheless issued an "Interim Award" on April 25, 1997, completely absolving World of any wrongdoing. (AA 0120.) It then ordered further briefing on the issue of attorneys' fees to be paid to World, despite the fact that no demand for such fees had ever been made by World until the arbitration hearing.[2] (AA 0122, 0130 at ¶ 2.) Mr. Habr objected to the panel's jurisdiction even to award attorneys' fees, given that such claims were neither demanded in the arbitration nor mentioned in the Plan of Reorganization, and had not been claimed in the bankruptcy. (AA 0130 at ¶ 2, 0282, 0293 at ¶ 10.) But the panel rejected Mr. Habr's objections and awarded World $309,

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11 debtor, this new and unexpected financial development placed a tremendous burden on his ability to conduct discovery in the case.

[2] Normally, it is necessary to identify any claim for a monetary award in the demand for arbitration so that the parties are provided with adequate notice. In a court of law, such a claim must be identified in the pleadings.

784.63 in attorneys' fees and expenses. (AA 0334 at ¶ 3.) It also ordered that Mr. Habr pay World's costs of arbitration in the amount of $10,604.17. (*Id.* at ¶¶ 4-5.) On October 6, 1997, World filed its Petition to Confirm Arbitration Award in the Superior Court. (AA 0115.)

E. The Removal

On October 20, 1997, Mr. Habr removed the petition to confirm the award to the United States Bankruptcy Court for the Northern District of California, Division Four, pursuant to 28 U.S.C. section 1452 and Bankruptcy Rule 9027. (AA 0127.) World brought a Motion for Remand and/or Abstention in that Court on or about November 12, 1997. The matter was transferred to San Jose in December 1997, for consideration by the court presiding over Mr. Habr's underlying bankruptcy case. (AA 0261.) Finding that the lack of a formal judgment prevented the Court from considering the propriety of any award against debtor Habr, the Honorable James R. Grube granted World's motion to abstain, after obtaining World's promise that any award that might issue against the debtor must be brought to the Bankruptcy Court for review and approval. (AA 0263.)

F. Confirmation of the Award

World renewed its petition to confirm the arbitration award in the Superior Court on June 11, 1998. (AA 0267.) Mr. Habr opposed the petition and requested vacation or correction of the award. (AA 0270.) On August 25, 1998, Judge Needham confirmed the arbitration award. (AA 0355.) Judgment was entered on September 23, 1998. (AA

0360.) World gave notice of the judgment's entry on October 2, 1998, (AA 0358,) and plaintiff Habr filed his Notice of Appeal within thirty days of the Notice of Entry. (AA 0363.)

IV.

STANDARD OF REVIEW

On appeal from an order confirming an arbitration award, the appellate court reviews the trial court's order *de novo*. *Lindenstadt v. Staff Builders, Inc.*, 55 Cal. App. 4th 882, 892 n.7 (1997); *see also Advanced Micro Devices, Inc. v. Intel Corp.*, 9 Cal. 4th 362, 376, fn.9 (1994); *California Faculty Ass'n v. Superior Court*, 63 Cal. App. 4th 935, 945 (1998); *Stirlen v. Supercuts, Inc.*, 51 Cal. App. 4th 1519, 1527 (1997); *Brookwood v. Bank of America*, 45 Cal. App. 4th 1667, 1670 (1996). "To the extent that the trial court's ruling rests upon a determination of disputed factual issues, we apply the substantial evidence test to those issues." *Lindenstadt*, 55 Cal. App. 4th at 892 n. 7; *see also Cochran v. Rubens*, 42 Cal. App. 4th 481, 484-486 (1996); *Engineers & Architects Assn. v. Community Development Dept.*, 30 Cal. App. 4th 644, 653 (1994). Thus, on appeal, the court re-evaluates the propriety of the arbitrators' decision anew.

In California, the standard for review of an arbitration award is statutory. Section 1286.2 of the Code of Civil Procedure provides as follows:

Subject to Section 1286.4[3] the court shall vacate the award if the court determines any of the following:

(a) The award was procured by corruption, fraud or other undue means.

(b) There was corruption in any of the arbitrators.

(c) The rights of the party were substantially prejudiced by misconduct of a neutral arbitrator.

(d) The arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted.

(e) The rights of the party were substantially prejudiced by the refusal of the arbitrators to postpone the hearing upon sufficient cause being shown therefor or by the refusal of the arbitrators to hear evidence material to the controversy or by other conduct of the arbitrators contrary to the provisions of this title.

(f) An arbitrator making the award was subject to disqualification upon grounds specified in subdivision (e) of Section 1282, but failed upon receipt of timely demand to disqualify himself or herself as required by those provisions. However, this subdivision does not apply to arbitration proceedings conducted under a collective

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[3] That section lists the procedural prerequisites for vacation of an arbitration award, which are not at issue in this case. Cal. Code Civ. Proc. § 1286.4.

> agreement between employers and employees or between their respective representatives.

Cal. Code Civ. Proc. § 1286.2.[4]

If any of the above conditions exist, the court must vacate the arbitrator's award. *Id.* Not only was the arbitration award procured by undue means (*see* § 1286.2(a)), but the arbitrators refused to consider evidence highly relevant to Mr. Habr's claim (*see* § 1286.2(e)) and the award that was entered exceeded the arbitrators' powers (*see* § 1286.2(d)). The arbitration award must be vacated.

V.

ARGUMENT

A. The Trial Court Erred by Confirming an Arbitration Award Based On A Claim Not Within The Scope of the Arbitration.

Mr. Habr's intentional misrepresentation claim against World was *not subject to an arbitration agreement.* Therefore, the award issued should have been vacated as outside the proper scope of the arbitration. *See Meat Cutters Local No. 439 v. Olson Bros., Inc.*, 186 Cal. App. 2d 200, 204 (1960) ("[T]he court will modify or vacate an award embracing matters not properly submitted to the arbitrator."). *See also Crofoot v. Blair Holdings Corp.*, 119 Cal. App. 2d 156, 182 (1960), *disapproved on other grounds, Posner v. Grunwald-Marx, Inc.*, 56 Cal. 2d 169, 183 (1961). The trial court erred by confirming the arbitration award.

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[4] All statutory references herein are to the California Code of Civil Procedure unless otherwise indicated.

1. The Agreement to Arbitrate Included Only the Sacramento Litigation Cross-Claims. It Did Not Include the Claims Later Made in The Alameda Action.

"The right to arbitration depends on a contract." *Boys Club of San Fernando Valley, Inc. v. Fidelity and Deposit Co. of Maryland*, 6 Cal. App. 4th 1266, 1271 (1992). "Accordingly, a party can be compelled to submit a dispute to arbitration *only where he has agreed in writing to do so.*" *Id.* (emphasis added); *see also Fontana Teachers Assn. v. Fontana Unified School Dist.*, 201 Cal. App. 3d 1517, 1521 (1988); and *Berman v. Renart Sportswear Corp.*, 222 Cal. App. 2d 385, 388 (1963).

Unless a litigant has agreed to arbitrate his or her claim, compelling binding arbitration violates his or her constitutional right to due process. *Bayscene Resident Negotiators v. Bayscene Mobilehome Park*, 15 Cal. App. 4th 119, 134-35 (1993). It further deprives the litigant of his or her "inviolate" right to trial by jury under the California Constitution. Cal. Const. art I § 16; *See Hebert v. Harn*, 133 Cal. App. 3d 465, 468, 69 (1982) (holding unconstitutional a superior court local rule preventing trial de novo after compelled arbitration).

Plaintiff Habr did *not agree* to arbitrate his intentional misrepresentation claims against World. To the contrary, plaintiff Habr only agreed to arbitrate his cross-claims *in the Sacramento Litigation*, in exchange for dismissal of World's foreclosure action. (AA 0055-56 at ¶ 3.)[5] Because

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[5] After entering into the stipulation to arbitrate the cross-claims, World immediately conducted a non-judicial foreclosure sale of the apartment complex.

the arbitration agreement pre-dates the Alameda Action and does not include any claims other than Mr. Habr's Sacramento cross-complaint, it *cannot* be the basis for compelling arbitration of the intentional misrepresentation claim brought in Alameda. *See Victoria v. Superior Court (Kaiser Foundation Hospitals)*, 40 Cal.3d 734, 744 (1985) (arbitration agreement not to be construed so as to compel arbitration of controversies which parties have not agreed to arbitrate). The Court erred by forcing the intentional misrepresentation claim to arbitration, and the arbitrators exceeded their powers in deciding that cause of action.[6] *Id.*, *Pacific Crown Distributors v. Brotherhood of Teamsters and Auto Truck Drivers, Local 70*, 183 Cal. App. 3d 1138, 1146 (1986). Under section 1286.2(d), the arbitration award must be reversed. *Pacific Crown Distributors*, 183 Cal. App. 3d at 1146.

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[6] "A party who has been compelled to submit to court-ordered arbitration is entitled to have the validity of that order reviewed on his appeal from a 'judgment confirming an award.' " *Kelly v. Tri-cities Broadcasting, Inc.*, 147 Cal. App. 3d 666, 672 (1983). *See also Graham v. Scissor-Tail, Inc.*, 28 Cal.3d 807, 811 n. 1 (1981); *Wheeler v. St. Joseph Hospital*, 63 Cal. App. 3d 345, 353 (1976). Moreover, an objection to subject matter jurisdiction – such as the power of an arbitration panel to consider an issue – may never be waived. *See United Firefighters of Los Angeles v. City of Los Angeles*, 231 Cal. App. 3d 1576, 1582 (1991). Thus, this Court is free to consider the question at this time.

2. The Arbitration Clause In the Draft Purchase Agreement Is Unenforceable as to the Intentional Misrepresentation Claim.

Because the stipulation to arbitrate the Sacramento Litigation cross-complaint does not include the Alameda claims, the only possible basis for compelling arbitration of the intentional misrepresentation claim is the initial purchase contract for the sale of Cadillac South Apartments. (AA 0046.) World Savings expressly agreed that the Dismissal Agreement was to be a complete integration of their agreement to arbitrate, and made no provision for arbitration beyond the causes of action stated in the cross-complaint in the Sacramento Litigation. (AA 0055-56 at ¶ 3, 0056-57 at ¶ 5c.)

Defendant World is estopped to argue that the new claim is subject to arbitration because when Mr. Habr's then-attorney sought to bring additional claims, World refused to allow the new claims to be included and threatened to enjoin Mr. Habr's counsel if he attempted to arbitrate.[7] (AA 0069.)

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[7] Mr. Demko, World's counsel, wrote, "It seems to me that the language of the agreement makes it clear that what is being arbitrated, and what World has agreed to arbitrate are the claims set forth in the first amended cross-complaint [of the Sacramento Litigation]. There is no allegation in the first amended cross-complaint that in any way can be construed as a claim that World should not have made the loan to Mr. Habr to allow him to acquire the property." Mr. Demko then threatens an injunction in the event that Mr. Habr's counsel causes the arbitrators to consider any claims other than "those claims set forth in Mr. Habr's first amended cross-complaint." (AA 0068-69.)

A party that repudiates arbitration cannot later reverse its position and force the opposing party to arbitrate. *Bertero v. Superior Court*, 216 Cal. App. 2d 213, 221-222 (1963); *Grunwald-Marx, Inc. v. Los Angeles Joint Board, Amalgamated Clothing Workers*, 192 Cal. App. 2d 268, 277-79 (1961). In reliance on the repudiation, the other party to the agreement must be permitted to bring suit in state court instead. *Bertero*, 216 Cal. App. 2d at 221-222. It is an abuse of discretion to compel arbitration in the face of such a repudiation. *Id.* at 222.

In this case, counsel for World insisted that Mr. Habr not file any new claims in the arbitration. (AA 0064-65, 0067-69.) It threatened to sue Mr. Habr's counsel in the event that the new claims were included in the arbitration. (AA 0069.) In so doing, World repudiated its right to arbitrate any claim not subject to the Dismissal Agreement. *Bertero*, 216 Cal. App. 2d at 220-222 (right to arbitration repudiated in letter from one party to the other). Mr. Habr should have been allowed to pursue his new claims in the Superior court. The intentional misrepresentation claim *was not* in the Sacramento Litigation. Nor was it properly compelled to arbitration. Thus, the arbitrators' award on that claim *must be vacated*. *Meat Cutters*, 186 Cal. App. 2d at 204. *See also Graham*, 28 Cal. 3d at 831; *Wheeler*, 63 Cal. App. 3d at 372-73 (reversing confirmation of award and ordering vacation where claim improperly referred to arbitration in absence of valid agreement to arbitrate).

B. The Trial Court Erroneously Confirmed an Arbitration Award Which Was Procured by Undue Means.

Under section 1286.2(a) of the Code, an arbitration award which is "procured by corruption, fraud or other undue means" must be vacated. Cal. Code Civ. Proc. § 1286.2(a). This section applies to the misconduct of a party as well as that of an arbitrator. *Pacific Crown Distributors,* 183 Cal. App. 3d at 1147; *see also Corral v. State Farm Mutual Auto Insurance Co.,* 92 Cal. App. 3d 1004, 1012-1014 (1979); *Rios v. Allstate Insurance Co.,* 68 Cal. App. 3d 811, 818-819 (1977).

In this case, respondent World repeatedly refused to comply with plaintiff's basic discovery requests. Most strikingly, World failed to produce the central loan file relevant to World's sale of Cadillac South Apartments until *after* Mr. Habr had already taken the depositions of World's percipient witnesses. World's attorneys claimed that until December of 1996 (after the depositions had taken place and just prior to the arbitration), there were no other files, and that all files had already been produced for inspection. The suppressed file included notes from the vice president of World directing that no one give the "rents" of Cadillac South Apartments to any potential buyer. The notes were critical evidence which could have proved that World had concealed the actual performance income performance of the property. But because of the lateness of the production, the vice president making the remark could not be deposed.

In December of 1996, after its witnesses had been deposed, World suddenly "found" 854 pages of loan files,

including the aforementioned note. (*See* AA 0293 at ¶ 11.) But Mr. Habr had already deposed World's witnesses at this stage and he did not have the means to repeat the depositions. Nor was Mr. Habr allowed to take the deposition of World's executive vice president, James Judd, whose involvement in the fraud alleged by Mr. Habr was only revealed by the suppressed file.[8] (AA 0111.) Plaintiff Habr was unable to question World's remaining witnesses about the documents, or to cross-examine World's building manager who had falsified the rent roll, until the arbitration hearing. (AA 0293 at ¶¶ 11-12, 0353-54 at ¶ 5.) Not only was Mr. Habr denied reasonable access to important witnesses and evidence in the case, but he was "depriv[ed] of a fair and impartial hearing to [his] substantial prejudice."[9] *Pacific Crown Distributors*, 183 Cal.

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[8] The suppressed file revealed that the sale had been reviewed and approved by Mr. Judd and that reports of World's strategy in selling the apartment complex were being made to Mr. Judd personally. Nevertheless, the arbitration panel oddly refused to compel his attendance at a deposition. (AA 0111).

[9] Only at the arbitration hearing was it finally revealed by World Vice President Reed that the overseeing of the sale had been specially assigned to a Mr. Carney, a vice president of World's located in the Upland-Ontario area of Southern California. It was his cryptic notation in the suppressed file not to "give the rents" to anyone that led to the revelation of his special status at the hearing. But, it was too late to procure his testimony. Mr. Carney's involvement was highly relevant to the fraud issue and was deftly suppressed by the withholding of the file. We doubt that this type of stonewalling would have succeeded had the case ben [sic] administered by an experienced judicial officer, who could have compelled attendance at the trial. Arbitration was simply not a suitable forum for this type of problem.

App. 3d at 1147. The arbitration award should be vacated on this basis alone. *Id.*; Cal. Code Civ. Proc. § 1286.2(a).

C. The Trial Court Erred by Confirming the Arbitration Award When The Arbitrators Had Refused to Hear Evidence Relevant to Appellant Habr's Claim.

Section 1266.2(e) provides that an arbitration award must also be vacated if "[t]he rights of a party were substantially prejudiced by . . . the refusal of the arbitrators to hear evidence material to the controversy. . . . " Cal. Code Civ. Proc. § 1286.2(e). In the present case, the arbitration panel not only refused to order Mr. Judd's participation, but also refused to permit counsel for plaintiff Habr to cross-examine World's primary witness regarding the false rent roll which was provided to plaintiff Habr prior to the sale. (AA 0353-54 at ¶ 5.) World's transmission of this rent roll to Mr. Habr was the heart of his intentional misrepresentation claim. Mr. Habr alleged that the rent roll was false, that World *knew* it was false, and that World gave it to Mr. Habr with the intention of inducing him to purchase an investment property which was in financial distress. (AA 0081-82 at ¶¶ 89-90.)

The witness, Thomas Harris, was the manager of the Cadillac South Apartments and the author of the bogus rent roll. Counsel for Mr. Habr needed to cross-examine Mr. Harris to establish not only that the rent roll was false when it was made, but that World had instructed him to give the rent roll to Mr. Habr in its false form. Without that testimony, plaintiff was hamstrung in proving his

intentional misrepresentation claim. In fact, this was the critical issue in the case.

The parties to an arbitration "have the right to assume that any arbitration hearing in which they become involved . . . will afford them the opportunity of presenting *all* of their material evidence and that the Arbitrator, before closing the hearing will inquire of all parties whether they have any further proofs to offer or witnesses to be heard." *Pacific Crown*, 183 Cal. App. 3d at 1147-48 (*quoting Harvey Aluminum, Inc. v. United Steelworkers of America*, 263 F.Supp. 488, 492 (C.D. Cal. 1967)) (emphasis added, internal quotes and original italics omitted). "[T]he focus . . . is upon whether the protesting party had an opportunity to discover and reveal the purported fraud at the arbitration hearing." *Pacific Crown*, 183 Cal. App. 3d at 1148 (*quoting Biotronik, Etc. v. Medford Medical Instrument Co.*, 415 F.Supp. 133, 138 (D.C.N.J. 1976)) (internal quotes and italics omitted). In this case, the arbitrators unfairly and prejudicially deprived Mr. Habr of the opportunity to present vital evidence supporting his intentional misrepresentation claim. The arbitration award should therefore be vacated. Cal. Code Civ. Proc. § 1286.2(e).

D. The Trial Court Erred by Confirming the Arbitrators' Award of Attorneys' Fees and Costs Against Appellant Habr, Because The Arbitrators Exceeded Their Powers in Making the Award.

It is well established that an arbitrator "cannot bind the parties with an award based on an issue or dispute

not properly submitted to him." *Thompson v. Jespersen*, 222 Cal. App. 3d 964, 967 (1990) (reversing confirmation of arbitration award where arbitrators improperly awarded attorneys' fees). *See also Victoria v. Superior Court*, 40 Cal. 3d at 739; *Meat Cutters*, 186 Cal. App. 2d at 204. Where the arbitration award impermissibly shifts fees and/or costs to one party, reversal is warranted. *Thompson*, 222 Cal. App. 3d at 967 (attorneys' fees); *Austin v. Allstate Ins. Co.*, 16 Cal. App. 4th 1812, 1815 (1993) (costs of arbitration). In this case, the arbitrators improperly ordered that Mr. Habr pay $252,139.49 in attorneys' fees,[10] plus $57,645.14 for the cost of the arbitration, including World's expert witness fees. (AA 0337.) Thus, the trial court erred in failing to set aside the award, and its decision should be reversed.

1. The Arbitration Panel Awarded Excessive Fees, Including Fees Incurred Outside the Arbitration Proceedings.

As Mr. Habr contended in the arbitration, there was no basis for the arbitrators to award attorneys' fees to World. In fact, World did not even request such an award until submission of an arbitration brief just prior to the arbitration hearing. (AA 0122, 0130 at ¶ 2.) Once the arbitration panel had made a decision in favor of World, it allowed World to submit a request for an award of over

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[10] The arbitration panel arrived at this number rather randomly, awarding World seventy-five percent of the fees it requested, minus approximately $1700 which was incurred while World pursued its claim in Mr. Habr's bankruptcy case. (AA 0337.)

$335,000 in attorneys' fees, and eventually awarded over $250,000 of the fees requested.

The award of $250,000 in attorneys' fees allegedly incurred in connection with an arbitration which lasted fewer than five days is " 'so exorbitant and wholly disproportionate . . . as to shock the conscience.' " *Tarver v. State Bar*, 38 Cal. 3d 122, 134 (1984) (*quoting Herrscher v. State Bar*, 4 Cal. 2d 399, 401-402 (1935), *quoting from Goldstone v. State Bar*, 214 Cal. 490, 498 (1931)) (internal quotes omitted). There is no doubt that the award is excessive, bearing no relation to an effort reasonably to be expended by counsel for World in connection with the arbitration. It should have been vacated by the trial court *See Levy v. Toyota Motor Sales U.S.A., Inc.*, 4 Cal. App. 4th 807, 814-15 (1992) ("Anchoring the analysis of reasonableness to this concept is the only approach that can claim objectivity, a claim which is obviously vital to the prestige of the bar and the courts" (*quoting Aetna Life & Casualty Co. v. City of Los Angeles*, 170 Cal. App. 3d 865, 880-881 (1985) (internal quotes omitted))).

Moreover, the arbitrators consciously overreached by granting fees outside the permissible scope of their award. Less than half of the fees claimed by World were represented to have been incurred in connection with the arbitration itself. Undaunted, the arbitrators awarded over $250,000 in attorneys' fees, specifically finding that "Respondent's entitlement is not restricted to fees and costs directly relating to the arbitration." (AA 0337.)

An arbitration panel may not award attorneys' fees incurred outside the arbitration proceeding itself. *DiMarco v Chaney*, 31 Cal. App. 4th 1809, 1817-18 (1995)

(amount of attorneys' fees awarded in connection with arbitration solely within purview of arbitrator, while award of fees resulting from related judicial proceedings to be made by trial court). It is clear that a grant of fees incurred outside the arbitration is in excess of the arbitrator's powers, and cannot be confirmed. Cal. Code Civ. Proc. § 1286.2(d).

2. The Arbitration Panel Impermissibly Awarded Word's Expert Witness Fees

The arbitrators also awarded $18,096.00 in fees paid to expert witnesses by World. (AA 0337.) However, expert fees may not be recovered as a cost of suit, whether in court or in an arbitration. Cal. Code Civ. Proc. § 1033.5(b)(1); *Austin v. Allstate Ins. Co.*, 16 Cal. App. 4th at 1815 n. 2. Section 1033.5 of the Code prohibits such an award, providing as follows in relevant part:

> (b) The following items are not recoverable as costs, except when expressly authorized by law:
> (1) Fees of experts not ordered by the court.

Cal. Code Civ. Proc. § 1033.5(b)(1).

There was no such law authorizing the award of expert witness fees operating in this case. By awarding expert witness fees in direct contravention of California law, the arbitrators exceeded their powers yet again. *See Blue Cross of California v. Jones*, 19 Cal. App. 4th 220, 229 (1993) (reversing confirmation of arbitration award where damages awarded not permitted under agreement between parties); *Thompson*, 222 Cal. App. 3d at 967 (reversing confirmation of attorneys' fee award where no

legal authorization for award existed). Thus, the trial court erred by confirming the award.

3. The Arbitrators Impermissibly Shifted the Costs of Arbitration to Appellant Habr.

Section 1284.2 of the Code of Civil Procedure provides:

> Unless the arbitration agreement otherwise provides or the parties to the arbitration otherwise, agree, each party to the arbitration shall pay his pro rata share of the expenses and fees of the neutral arbitrator, together with other expenses of the arbitration incurred or approved by the neutral arbitrator, not including counsel fees or witness fees or other expenses incurred by a party for his own benefit.

Cal. Code Civ. Proc. § 1284.2.

In the absence of an agreement to the contrary, an arbitrator may not shift the cost of an arbitration from one party to another. *Austin v. Allstate Ins. Co.*, 16 Cal. App. 4th at 1815. In this case, the Dismissal Agreement did not contain a fee-shifting clause.[11] (AA 0051.) Nor can the initial purchase contract be the basis for submitting plaintiff Habr's claims to arbitration, where there has

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[11] To the contrary, the Dismissal Agreement required that Mr. Habr waive his entitlement to attorneys' fees and costs in connection with the Sacramento Litigation. (AA 0054-55 at ¶ 1.) No answer to the cross-complaint was ever filed (World was busy demurring), and thus no pleading ever stated a claim for either attorneys' fees or costs for World, in either the Sacramento Litigation, The Alameda Action, or the arbitration.

been a complete integration of the parties' rights in a new contract and the new contract makes no provision for the shifting of costs. The arbitration panel completely exceeded its powers by awarding the costs of arbitration to World. Accordingly, the trial court further erred by confirming an arbitration award which shifted the costs of arbitration to Mr. Habr.

E. The Arbitration Award Is In Violation of a Federal Injunction and the Bankruptcy Court's Order of Confirmation of Appellant's Plan of Reorganization, and as Such, This Court Cannot Affirm the Award.

It is [sic] has long been the rule that where an arbitration award commands an act which is contrary to law or public policy, the courts will not confirm the award. *See Black v. Cutter Laboratories,* 43 Cal. 2d 788, 799 (1955); *Pacific Gas and Elec. Co. v. Superior Court,* 15 Cal. App. 4th 576, 610 (1993), *declined to follow on another point, Advanced Micro Devices, Inc. v. Intel Corp.,* 9 Cal. 4th 362, 376-77 (1994); *Joe A. Freitas & Sons v. Food Packers, Processors and Warehsmn. Local 865,* 164 Cal. App. 3d 1210, 1219 (1985); *American and Nat. Leagues of Prof. Baseball Clubs v. Major League Baseball Players Ass'n,* 59 Cal. App. 3d 493, 498 (1976). In this case, the arbitrators' award permitted World to pursue a claim against Mr. Habr, despite the fact that the claim had already been discharged in bankruptcy. This is in direct contravention of the United States Bankruptcy Code as well as the Bankruptcy Court order confirming Mr. Habr's Plan of Reorganization.

The issue turns on the question of whether World's attorneys' fee claim arises from a contract which pre-exists the filing of Mr. Habr's Chapter 11 petition. If so, the debt is deemed to be "incurred" prior to the petition and is discharged by the confirmed plan. Under federal bankruptcy law, the attorneys' fees awarded by the arbitration panel in this case were "incurred" prior to the filing of Mr. Habr's Chapter 11 bankruptcy petition and long before the confirmation of Habr's Plan of Reorganization. *See In re Abercrombie*, 139 F.3d 755, 759 (9th Cir. 1998) (defendant prevailing in litigation against debtor plaintiff not permitted to recover as administrative expense attorneys' fees awarded against debtor where dispute arose out of real estate contract executed prior to filing of bankruptcy).[12]

A pre-confirmation claim such as this must be filed *prior* to confirmation of the debtor's plan of reorganization, even though the claim may be contingent on the outcome of pending litigation. Otherwise, it is discharged

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[12] *In re Abercrombie* confirms that a claim which has its genesis in a pre-petition contract must be classified as a pre-petition general claim, to be asserted in the normal bankruptcy claim approval process. *In re Abercrombie*, 139 F.3d at 758. World failed to mention the claim during its many appearances in the Habr bankruptcy, and instead asserted it for the fist time during the arbitration hearing. This does not give rise to a new "administrative" claim "during the pendency of the bankruptcy" which can be asserted after World has prevailed. *Id*. The opinion of the Ninth Circuit in *In re Abercrombie* specifically rejects World's contrary view, as expressed by the lower Bankruptcy Appellate Panel in *In re Madden*, 185 B.R. 815 (9th Cir. BAP 1995). *See In re Abercrombie*, 139 F.3d at 759.

when the plan is confirmed. 11 U.S.C. § 1141(d)(1)(A).[13] World never made any such claim, despite its awareness of the litigation and participation in the Plan confirmation process. The litigation itself was repeatedly mentioned in the Plan as an asset of the bankruptcy estate. (*See* AA 0311 at ¶ 35, 0315-17 at art. VI.) Any unasserted claim by World for attorneys' fees was completely discharged upon confirmation of the Plan. 11 U.S.C. § 1141(d)(1)(A).

Habr's Sixth Amended Plan Of Reorganization was confirmed by the Bankruptcy Court on January 6, 1997. (AA 0325.)[14] It provides that any claim against the estate not made prior to confirmation is null and void:

> 13.1 The provisions of the confirmed Plan shall bind the Debtor and any creditor, whether or

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[13] Section 1141(d)(1) provides:

> Except as otherwise provided in this subsection, in the plan, or in the order confirming the plan, the confirmation of a plan –
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> (A) discharges the debtor from any debt that arose before the date of such confirmation . . . whether or not –
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> (i) a proof of claim based on such debt is filed or deemed filed under section 501 of this title;
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> (ii) such claim is allowed under section 502 of this title; or
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> (iii) the holder of such claim has accepted the plan;
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> . . .

11 U.S.C. §1141(d)(1).

[14] World appeared in the Habr Chapter 11 proceeding on five separate occasions objecting to proposed plans of reorganization, but at no time did it ever raise the issue of a claim for attorneys' fees or arbitration costs.

> not the claim of such creditor is impaired under the Plan and whether or not such creditor has accepted the Plan.
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> 13.4 The Debtor is forever discharged from any and all debts that arose prior to the Confirmation Date, except for claims and/or obligations for which the Debtor shall remain responsible pursuant to the provisions of this Plan and except for any debts determined by the Bankruptcy Court to be non-dischargeable.
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> 13.5 All creditors whose debts are discharged by the Order of Confirmation and all creditors whose judgments are declared *null and void by the Order of Confirmation shall be forever enjoined from instituting or continuing* any action or employing any process or engaging in any act to collect such debts as liabilities of the Debtor.

(AA 0320-21 at ¶¶ 13.1, 13.4-13.5 (emphasis added).)

Although the confirmed Plan specifically mentioned Mr. Habr's arbitration against World in several places, the Plan contains no provision for payment of attorneys' fees claimed against Habr in the action. World filed a claim as a creditor of the estate as well as many objections to the confirmation of the Plan in Mr. Habr's underlying bankruptcy, but never made mention of the attorneys' fees that it was incurring in connection with the arbitration.[15] As Judge Grube notes in the Order confirming the

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[15] Nor did World ever claim attorneys' fees at any point in the Sacramento or Alameda Actions. If World intended to pursue a claim for attorneys' fees, it had a duty to reveal its intentions and submit its claim during the bankruptcy plan approval process. The creditors voting on the plan are entitled

Plan, the Plan was confirmed over World's objections; nonetheless, the Bankruptcy Code provides that World is bound by the confirmation. Accordingly, its claims are extinguished. (AA 0325); 11 U.S.C. § 1141(d)(1).

Furthernore, the Bankruptcy Statutes specifically enjoin World from "continuing any action" to collect such debts. 11 U.S.C. § 524(a)(2).[16] As a result, any attempt on World's part to recover attorneys' fees in this case is in *direct violation* of section 524(a)(2) the Code, and in violation of the Bankruptcy Court's Order confirming the Plan. *Id.* As explained above if an arbitration award "commands an act which is unlawful or against public policy, it will be vacated." *American and Nat. Leagues of Prof. Baseball Clubs*, 59 Cal. App. 3d at 498. Mr. Habr

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to know its financial impact. World's lawyers apparently were devoting a huge amount of time in relationship to the magnitude of the proceedings. They should have revealed their scheme to assert a huge claim for fees so that the Bankruptcy Court and the creditors could adequately review the plan.

[16] This section reads:

(a) A discharge in a case under this title –

(1) voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged under section . . . 1141 . . . of this title, whether or not discharge of such debt is waived;

(2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not such debt is waived . . .

. . .

11 U.S.C. § 524(a), subs.(1)&(2).

immediately brought the stay of the Bankruptcy Court to the attention of the arbitration panel, but his protest fell on deaf ears. (AA 0168, 0194.) The trial court's confirmation of the panel's award of a debt which had been discharged in bankruptcy was erroneous.

The Ninth Circuit's opinion in *In re Abercrombie* holds that a claim for attorneys' fees awarded in litigation regarding a real estate contract which, as in the present case, was executed prior to the debtors' filing of a bankruptcy petition, is to be considered a claim for a debt incurred on the date the contract was executed. *In re Abercrombie*, 139 F.3d at 758-59. World is making exactly the same type of claim which was made in *Abercrombie*.[17] The attorneys' fees here are deemed to have been "incurred" on April 17, 1992, the date the agreement for the sale of Cadillac South Apartments was executed. Mr. Habr's bankruptcy petition was filed some two years later. Thus, World's claim is for a pre-petition debt which was deemed discharged upon confirmation of Mr. Habr's Plan of Reorganization. 11 U.S.C. §§ 524, 1141.

World may attempt to argue that the recent opinion in *Siegel v. Federal Home Loan Mortgage Corp.*, 143 F.3d 525 (9th Cir. 1998), supports its position. In that case, the court upheld a post-confirmation award of attorneys' fees against a bankruptcy debtor where the award was made

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[17] Only after the panel's interim award, counsel for World notified Mr. Habr's bankruptcy attorney that it would attempt to recover the fees by classifying them as an administrative claim in the bankruptcy case, just as occurred in *Abercrombie*. (AA 0153.) However, as explained above, the Ninth Circuit has rejected this tactic. *In re Abercrombie*, 139 F.3d at 758-59.

in litigation also arising out of a pre-petition contract. However, the Ninth Circuit's decision in *Siegel* is actually consistent with its prior opinion in *Abercrombie*, which holds *against* World, as noted above.

In *Siegel*, the debtor brought an action for breach of contract and tort against his lender charging that the lender had wrongfully recovered a deficiency judgment on his property, despite the fact that the bankruptcy court had already approved the deficiency when the lender filed a claim in the debtor's bankruptcy case, to which claim the debtor made no objection. *Siegel*, 143 F.3d at 529, 531. The lender prevailed on summary judgment in the debtor's wrongful foreclosure suit, on the basis that the bankruptcy court's prior approval of the deficiency claim was res judicata. The trial court then correctly assessed attorneys' fees because the dispute arose out of the debtor's post-bankruptcy decision *to re-assert* his objection to the claim in the form of a wrongful foreclosure proceeding. *Id.* at 528. Siegel appealed, and the Ninth Circuit affirmed, finding that the bankruptcy court's allowance of the deficiency claim was res judicata of the debtor's wrongful foreclosure action. *Id.* at 531.

On the issue of attorneys' fees, the *Siegel* court reasoned that its genesis was derived from the debtor's decision to reopen the deficiency issue *after it had already been determined by the bankruptcy court*. Thus, *Siegel* did not raise the issue of a bankruptcy discharge preventing an award of attorneys' fees. *Siegel*, 143 F.3d at 533. Recognizing that attorneys' fees arising from a pre-petition contract will be discharged in bankruptcy à la *Abercrombie*, the *Siegel* court found that the debtor's choice to revive the deficiency issue also revived his exposure for

attorneys' fees, and therefore was a post-filing decision which gave rise to liability for attorneys' fees as administrative costs. *Id; Cf. Christian Life Ctr. Litig. Defense Comm. v. Silva (In re Christian Life)*, 821 F.2d 1370, 1374 (9th Cir 1987); *and Employees' Retirement Sys. v. Osborne (In re THC)*, 686 F.2d 799, 803-04 (9th Cir. 1982). The *Siegel* court noted that but for the revival decision, the debtor would have been freed from liability, stating:

> This is a case where the debtor, Siegel, had been freed from the untoward effects of contracts he had entered into. [The lender] could not pursue him further, nor could anyone else.

Siegel, 143 F.3d at 533.

In stark contrast, World never raised the issue of attorneys' fee claims, even though it was well aware of Mr. Habr's claims related to the sale of the apartment complex. In short, it was *World* who had the opportunity to make a claim for potential attorneys' fees prior to discharge, but failed to do so. Any such claim for fees by World was fully discharged and cannot be awarded against Mr. Habr now. *In re Abercrombie*, 139 F.3d at 758-59.

The Bankruptcy Code prohibits World from asserting its claim for attorneys' fees against Mr. Habr in this case. The arbitration panel exceeded its powers by making such award – violating both the confirmation order and the injunction of section 524 of the Bankruptcy Code. Accordingly, the Arbitration Award must be vacated. Cal. Code Civ. Proc. § 1286.2(d).

VI.

CONCLUSION

The purpose of the laws governing judicial review of arbitration awards in California "is to promote contractual arbitration, in accordance with a 'strong public policy' in favor thereof [citation omitted] as a more expeditious and less expensive means of resolving disputes than litigation." *Mercury Ins. Group v. Superior Court*, 19 Cal. 4th 332, 342 (1998) (*quoting Ericksen, Arbuthnot, McCarthy, Kearney & Walsh, Inc. v. 100 Oak Street*, 35 Cal. 3d 312, 322 (1983)). Moreover, it is certain that fundamental due process rights and the "elementary requirements of impartiality" are not suspended when a matter is adjudicated by way of contractual arbitration, rather than in a judicial proceeding. *See Commonwealth Corp. v. Casualty Co.*, 393 U.S. 145, 146, 150 (1968). Here, Mr. Habr was deprived of a jury trial and forced to arbitrate a claim against his will, was forced to deposit nearly $40,000 in advance of the arbitration without prior notice (which was four times the original fee), was prevented from obtaining discovery of central evidence and witnesses in the case and was prohibited from cross-examining the primary witness in order to establish the very heart of his fraud claim. Finally, Mr. Habr was faced with a claim in the amount if $320,000 for attorneys' fees and costs arising out of a four and one-half day arbitration (without any prior notice), even though federal and state laws prohibit such a claim. Where the conduct of the arbitration has gone so completely awry, the award must be vacated.

For the foregoing reasons, plaintiff and appellant Stan Habr respectfully requests that this Court reverse the order of the trial court, vacate the arbitration award and permit plaintiff Habr to proceed to jury trial.

Respectfully submitted,

Dated: March 25, 1999

LUKENS AND DRUMMOND
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Attorney for _____
Defendant/
Cross-Complainant Habr

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO

WORLD SAVINGS AND LOAN ASSOCIATION, a federal savings and loan association,

Plaintiff,

v.

STAN HABR; and DOES 1 through 50, inclusive,

Defendants.

_____/

No. 531746

STAN HABR,

Cross-Complainant,

v.

WORLD SAVINGS AND LOAN ASSOCIATION, a Federal Savings and Loan Association and ROES 1-10, Inclusive,

Cross-Defendants.

_____/

FIRST AMENDED CROSS-COMPLAINT FOR BREACH OF CONTRACT, INTENTIONAL NON-DISCLOSURE OF MATERIAL FACT, RESTITUTION, AND VIOLATION OF COVENANT OF GOOD FAITH AND FAIR DEALING

Comes now defendant/cross-complainant, STAN HABR, and cross-complains and alleges of cross-defendants, and each of them, as follows:

1. Cross-defendants, Roes 1-10, Inclusive, are sued herein under fictitious names; the true names and capacities of those agents and employees of World Savings who entered into or participated in the negotiations which concluded in the sale of the subject commercial real property to Habr being unknown at this time to cross-complainant. When said true names and capacities are ascertained, cross-complainant will make amendment to his Cross-Complaint by including said true names and capacities herein.

2. At all times herein mentioned, all of the cross-defendants were each the employees, servants, agents, and joint venturers of the other cross-defendants, and acting within the scope of their employment, service, agency and joint venture, and each is legally responsible for the acts and omissions of the others.

3. At all times mentioned herein, cross-complainant, Stan Habr (hereinafter "Habr") was an individual residing in Santa Clara County, California.

4. At all times mentioned herein, cross-defendant World Savings and Loan Association (hereinafter "World") was a federal savings and loan association licensed to do business in the State of California.

5. Plaintiff/cross-defendant, World, has heretofore filed an action for damages against defendant/cross-complainant Habr and unnamed others in the above-entitled

action. Without admitting the truth of any of the allegations of said Complaint, the allegations of said Complaint are incorporated herein by reference as though fully set forth.

6. During the months of February and March 1992, Habr and World entered into protracted negotiations for the sale and purchase of commercial and real property legally described in World's Complaint, and commonly referred to and known as Cadillac South Apartments, 5900 Riza Ave., Sacramento, CA (hereinafter "the subject property.")

7. The parties hereto entered into a contract and executed documents, and escrow closed by the middle of April 1992. A copy of that initial contract dated February 24, 1992, and the subsequent counter-offers thereto are affixed to this First Amended Cross-Complaint as Exhibits "A", "B", "C", "D", "E", "F", "G", "H", and "I", Inclusive, with the intent to incorporate herein as though fully set forth.

8. Pursuant to the initial Real Estate Purchase Contract and Receipt for Deposit dated February 24, 1992, running to five pages, cross-defendant World warranted that:

> 5. TITLE: Title is to be free of liens, encumbrances, easements, restrictions, rights and conditions of record or known to seller other than the following: (A) current property taxes, (b) covenants, conditions, restrictions and public utility easements of record, if any, provided the same do not adversely effect the continued use of the property for the purposes of

which it is presently being used, unless reasonably disapproved by buyer in writing within 10 calendar days of receipt of a current preliminary report furnished at seller's expense, and (c) . . . READ PARAGRAPH 18 FOR IMPORTANT TERMS.

17(B) (2). "CONDITION OF PROPERTY": Seller warrants, through the date possession is made available to buyer: (2) the roof is free of all known leaks, and (3) built-in appliances and water, sewer/septic, plumbing, heating, electrical, air conditioning, pool/spa systems, if any, are operative . . .

17(D). "SELLER REPRESENTATION": Seller warrants that seller has no knowledge of any notice of violations of city, county, state, federal, building, zoning, fire, health codes or ordinances, or other governmental regulation filed or issued against the property.

17(K) "RENTAL/SERVICE AGREEMENTS": Within 15 calendar days of acceptance of the offer, seller shall make available to buyer for inspection and review: (2) a rental statement, including names of tenants, rental rates, period of rental, date of last rent increase, security deposits, rental concessions, rebates or other benefits, if any, and a list of delinquent rents and their duration. Seller represents that no tenant is entitled to any rebate, concession, or other benefit except as set forth in the documents to be furnished.

9. Within approximately three weeks of the close of escrow, Habr found that World, without justification or excuse, breached those material covenants so enumerated by not disclosing or misrepresenting the following facts:

(A) That on or about January 17, 1991 the City of Sacramento had filed suit against the then owners of the subject property for abatement of public nuisance, injunctive relief and damages, violation of statutory duty – Health & Safety Code §§ 17980.6 and 17980.7, and for a receivership. This case had been filed in the Superior Court of California, in and for the County of Sacramento, as Case #518358, entitled *City of Sacramento, a municipal corporation v. Cadillac South Apartments, et al.* Habr was first told of such a lawsuit at the time of the signing in escrow, and then it had been represented to him by World's agent as originating from the illicit traffic in drugs on the subject property.

(B) A representative from the Dangerous Housing Department for the City of Sacramento informed habr that said suit was still pending and had been on the property for approximately one year. Further, the city's representative informed Habr that he had three weeks to correct the enumerated violations in the City of Sacramento suit, or the subject property would be bulldozed.

(C) Four complexes were leaking and had to be completely re-roofed.

(D) Pursuant to the rent role provided to Habr by World's agent indicating tenancy as of March 23, 1992, fifteen to twenty units were not disclosed to be delinquent and/or occupied by tenants that should never have been permitted to rent, and who were subsequently evicted from the property for non-payment of rent.

(E) At least fifteen units of the subject complex were in an undisclosed state of severe disrepair and dilapidation.

10. World knew or should have known of the actual condition of the subject real property, the status of the City of Sacramento's lawsuit, and the qualifications of the tenants on the subject property because World was the owner of the property and had recently reacquired the subject property in a foreclosure sale.

FIRST CAUSE OF ACTION

(Breach of Contract)

11. Cross-complainant hereby incorporates the foregoing allegations contained in Paragraphs 1 through 10 hereinabove as though fully set forth.

12. On or about April 17, 1992, Habr executed escrow documents and purchased the subject property from world, pursuant to the written contract. Pursuant to the contract and the escrow instructions, Habr, at that time, made his required down payment.

13. The initial purchase contract in five pages, dated February 24, 1992, Exhibit "A" hereto, was initialled by Habr incorporating the warranties of Paragraph 17 into the agreement. A copy of this initial purchase contract was sent by fax to World. World allegedly executed but failed to return the contract, and apparently did not initial Paragraph 17. On or about February 26, 1992, world counter-offered, modifying terms relating to price, terms of payment, commissions and dates of escrow (Exhibit "B"). In addition to these modifications the counter-offer reads, "the balance of the contract not in contravention hereto, to remain the same."

14. By its silence and failing to return the initialled purchase contract to Habr, and by its counter-offer of February 26, 1992 incorporating all terms and conditions of the purchase contact [sic] not thereby modified, World agreed to and warranted those terms and conditions as expressed in Paragraph 17 of the initial purchase contract.

15. By the actions alleged in Paragraph 9 above, World breached the purchase contract, specifically those warranties, and terms and conditions set forth in Paragraphs 5 and 17 (B) (2), (D), and (K).

16. Within approximately a three week period, Habr learned of these breaches and material misrepresentations by World and expended money to immediately make undisclosed but necessary repairs in an amount according to proof. Said expenditures are within the jurisdiction of this court.

17. In addition to making repairs, Habr was given the option by the city of Sacramento to apply to the Sacramento Housing & Redevelopment Agency for a rehabilitation loan for funding to rehabilitate the Cadillac South apartment complex. It was represented to Habr by employees of the City, and he understood it to be, the only recourse to stay the scheduled demolition of several of the complexes on the subject property.

18. Within a short period of time, Habr also had to begin eviction proceedings on fifteen to twenty units for non-payment of rent.

WHEREFORE, cross-complainant prays for relief pursuant to California Civil Code § 3306 as set forth hereinbelow.

SECOND CAUSE OF ACTION

(Intentional Non-Disclosure of Material Fact)

19. Cross-complainant hereby incorporates the foregoing allegations contained in Paragraphs 1 through 18 hereinabove, as though fully set forth.

20. During the entire period of negotiation for the sale and purchase of the subject property, seller World misrepresented or failed to dislcose the existence of a City of Sacramento lawsuit for public nuisance and nuisance per se, and violation of various Health and Safety Code statutes on the subject property. World failed to disclose the actual condition of the roofs on many of the complexes on the subject property and the fact that the roofs had to be completely replaced. Seller, World, failed to disclose that the rent role presented to buyer, Habr, by World was padded or inflated with renters who were delinquent or who were unsuited as tenants and had to be immediately evicted from the subject property. World misrepresented or failed to disclose that fifteen additional units were in serious disrepair.

21. World was aware of the City of Sacramento lawsuit on the subject property; and having recently, before the sale to Habr, taken the subject property back in foreclosure, knew their representations made to Habr were false and also knew of additional material defects which were not disclosed to Habr.

22. On information and belief, Habr alleges that seller, World, intentionally misrepresented and withheld such information to induce him to purchase the property quickly so that it might be removed from the accounting and books of World by the conclusion of the first quarter of 1992.

23. Habr reasonably relied upon the omissions and misrepresentations of World, and not knowing of the material omissions, entered into contract and purchased the subject property and was consequently and subsequently damaged as hereinabove alleged. Moreover, these acts by World were willful, wanton, malicious, and oppressive, and were undertaken with the intent to deceive, such that they justify the awarding of exemplary and punitive damages in an amount to be ascertained at trial.

WHEREFORE, cross-complainant prays for relief pursuant to California Civil Code § 3343 as set forth hereinbelow.

THIRD CAUSE OF ACTION

(Negligent Misrepresentation of Material Fact)

24. Cross-complainant hereby incorporates the foregoing allegations contained in Paragraphs 1 through 23 hereinabove, as though fully set forth.

25. Pursuant to the negotiations for the sale and purchase of the subject property, World misrepresented the legal and physical status of the property, and inflated rent roles. Such representations were material and false.

World either knew of their falsity or made such misrepresentations without reasonable grounds for believing them to be true, with the intent to induce Habr to purchase the subject property.

26. In reliance upon these misrepresentations, Habr reasonably relied upon the information provided to him, and consequently and subsequently incurred those damages as have been heretofore enumerated. Moreover, these actions and omissions by World were willful, wanton, malicious, and oppressive, and were undertaken with the intent to deceive, such that they justify the awarding of exemplary and punitive damages in an amount to be ascertained at trial.

WHEREFORE, cross-complainant prays for relief as hereinafter set forth.

FOURTH CAUSE OF ACTION

(Restitution)

27. Cross-complainant incorporates the foregoing allegations contained in Paragraphs 1 through 26 hereinabove, as though fully set forth.

28. From the date of learning of the material misrepresentations and non-disclosures concerning his purchased property and his application to the City of Sacramento for a rehabilitation loan, Habr began negotiations with World in an attempt to establish some type of deferred payment schedule which would permit him to make the necessary but undisclosed repairs, solicit appropriate tenants, and secure the rehabilitation loan. These

negotiations endured for approximately three months and were terminated by World.

29. Therefore, Habr has no alternative but to give World notice of rescission, and to pray for relief pursuant to California Civil Code §1692.

WHEREFORE, cross-complainant prays for relief as hereinafter set forth.

FIFTH CAUSE OF ACTION

(Violation of Covenant of Good Faith and Fair Dealing)

30. Cross-Complainant hereby incorporates the foregoing allegations contained in Paragraphs 1 through 29 hereinabove, as though fully set forth.

31. In and through their misrepresentations and omissions of material fact, World has breached the implied covenant of good faith and fair dealing that the contract for the sale and purchase of the subject commercial real property would normally contain. Specifically, because of the unanticipated expenses occasioned by World's misrepresentations and omissions, and by its actions has alleged in Paragraph 26 above, Habr was unable to manage the subject property and realize the benefit of his bargain, and at the same time, honor his mortgage obligations to World.

32. Habr, in good faith and in reasonable reliance upon the representation and word of World, entered into and executed the contract for purchase and sale of the subject property, and attempted to manage the subject property. He would not have done so if he had known the

true condition and status of the subject property, and the hidden costs therein.

WHEREFORE, cross-complainant prays for relief as set forth below.

First Cause of Action:

1. Actual and compensatory damages according to proof and in an amount in excess of the jurisdictional limitation of this court;

2. Consequential damages according to proof;

3. Interest at the legal rate from April 1, 1992; and

4. Attorney's fees pursuant to contract.

Second Cause of Action:

5. Actual and compensatory damages according to proof;

6. Consequential damages, including lost profits from the subject property from the date of purchase, according to proof;

7. Reasonable attorney's fees pursuant to California Code of Civil Procedure §1021; and

8. Exemplary or punitive damages as this court deems just and proper.

Third Cause of Action:

9. Actual and compensatory damages according to proof;

10. Consequent damages, according to proof;

11. Interest at the legal rate from April 1, 1992;

12. Reasonable attorney's fees pursuant to California Code of Civil Procedure § 1021; and

13. Exemplary or punitive damages as this court deems just and proper.

Fourth Cause of Action:

14. Rescission of that sales and purchase contract for the subject real property;

15. Restitution and compensatory damages according to proof in an amount in excess of $350,000.00;

16. Consequential damages, according to proof, including reasonable attorney's fees; and,

17. Interest at the legal rate from April 1, 1992.

Fifth Cause of Action:

18. Actual and compensatory damages according to proof and in an amount in excess of the jurisdictional limitation of this court;

19. Consequential damages according to proof;

20. Interest at the legal rate from April 1, 1992; and

21. Attorney's fees pursuant to contract.

DATED: June 8, 1993.

/s/ W. Kenneth Howard
W. KENNETH HOWARD, ESQ.
Attorney for Cross-Complainant
STAN HABR